

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**PEDRO M. NENNINGER,
APPELLANT
vs.**

**JAMIE L. SMITH,
RESPONDENT**

DOCKET NUMBER WD75152 (Consolidated with WD75153)

DATE: MARCH 19, 2013

Appeal from:

The Circuit Court of Boone County, Missouri
The Honorable Leslie M. Schneider, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

Attorneys:

Tony R. Nenninger, for Appellant

Douglas F. Pugh, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

PEDRO M. NENNINGER, APPELLANT

v.

JAMIE LYNNE SMITH, RESPONDENT

WD75152

Boone County, Missouri

Before Division Three Judges: Cynthia L. Martin, P.J., Joseph M. Ellis and Gary D. Witt, JJ.

Pedro Nenninger appeals from a judgment entered in the Circuit Court of Boone County issuing a full order of adult protection to Jamie Smith, granting Smith sole physical and legal custody of the child Nenninger had with Smith, and denying Nenninger's request for visitation with the child. Nenninger also challenges the circuit court's dismissal of his petition for an order of adult protection against Smith.

Prior to filing her petition for an order of adult protection, Smith had a full order of adult protection against Nenninger for which she did not request an extension. Nenninger was serving a five-year term in the Missouri Department of Corrections when the motion was filed and when the judgment was entered.

AFFIRMED IN PART, REVERSED IN PART.

Division Three holds:

(1) It would be wholly illogical for Smith to be allowed to avoid the burden of proving an immediate and present danger of abuse, as required for the renewal of a full order of protection, by simply letting the initial full order of protection lapse and then filing a new motion for a full order of protection averring the same allegations of abuse that formed the basis for the initial order. Accordingly, to obtain a new order of protection, Smith was required to plead and prove new allegations of abuse or stalking.

(2) The only new allegations asserted in Smith's motion were related to letters and phone calls from Nenninger to the couple's child. Those allegations and the evidence supporting them were not sufficient evidence of harassment to support the issuance of a protective order.

(3) With regard to the phone calls from prison, Smith indicated that she was irritated with how often Nenninger was calling her home to try to talk to their child and that the harassment was these frequent attempts to talk to the child. She did not indicate that any of his conversations with her were threatening in any manner, though she testified that in general she feels fearful of and threatened

by him. The small degree of anxiety that Smith claimed to suffer as a result of these calls did not rise to the level of substantial emotional distress required to support a finding of harassment, especially in light of the fact that Smith successfully has all calls from the prison blocked prior to filing her motion.

(4) With regard to the letters sent by Nenninger to the couple's child, Smith did not submit any of those letters into evidence, did not testify as to the content of any of the letters, and did not indicate how many letters had been sent by Nenninger or how many, if any, she had ever opened or read. Smith's testimony regarding the letters was simply insufficient to support a finding that she suffered substantial emotional distress as a result of Nenninger sending them to the child and is certainly insufficient to support a finding that such letters would have caused substantial emotional distress in a reasonable person.

(5) Moreover, nothing in Smith's testimony reflected a belief on her part that any of Nenninger's phone calls or letters were pretextual in nature or were anything other than legitimate attempts to communicate with his child. Thus, Smith failed to prove the necessary element for a finding of harassment that Nenninger's actions served no legitimate purpose.

(6) As the circuit court's entry of a full order of protection in favor of Smith is not supported by sufficient evidence, the judgment must be reversed.

(7) For a full order of adult protection to be proper, the petitioner is required to prove an immediate and present danger of future abuse or stalking, albeit that burden is almost always satisfied as a result of the rebuttable presumption of immediate and present danger arising from proof of one or more acts of abuse. While his petition averred allegations of long-past abuse of Nenninger by Smith, Nenninger's attorney conceded during the hearing on the motion to dismiss that the only present and future abuse Nenninger was alleging was Smith's harassment of him by the denial of contact with their child and use of the child as a pawn to punish him. Those are, quite simply, not the type of "abuse" sought to be addressed by the act. Simple blocking of communication with a child and alienation of affections are claims properly address by way of a standard domestic relations case.

(8) In light of Nenninger's admitted incarceration and lack of fear of any actions by Smith aside from her continued interference with his communication with the child, the circuit court's dismissal of his petition without prejudice was not erroneous.

Opinion by Joseph M. Ellis, Judge

Date: March 19, 2013

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